

FRESA CONSTRUCTION CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-27

Decided February 26, 1988

Petition for discretionary review of an order of Administrative Law Judge Joseph E. McGuire (Hearings Docket No. CH 7-5-P) dismissing petition for review of a proposed civil penalty assessed for Cessation Order No. 87-11-018-01(1).

Petition granted; order of dismissal reversed; case remanded for hearing.

1. Rules of Practice: Hearings--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Prepayment--Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

Where a petition for review of a proposed civil penalty is filed and full prepayment is made within the time period prescribed by 43 CFR 4.1151(b) in the Hearings Division, Office of Hearings and Appeals, in Arlington, Virginia, the fact that the petition is not "accompanied by" the prepayment should not result in dismissal of the petition.

2. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Final Order

A request for award of costs and expenses under sec. 525(e) of SMCRA is properly filed only following issuance of a final order in the proceeding. 43 CFR 4.1291. A request filed during the pendency of a proceeding is properly dismissed as untimely.

APPEARANCES: David J. Romano, Esq., and James N. Riley, Esq., Clarksburg, West Virginia, for Fresa Construction Company, Inc.; Wayne A. Babcock, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Fresa Construction Company, Inc. (Fresa), has filed a petition for discretionary review 1/ of a notice of proposed assessment of a civil penalty of \$900 for Cessation Order (CO) No. 87-11-018-01(1), issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE). The petition is filed pursuant to section 518 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1268 (1982), and implementing regulations.

OSMRE issued this CO on April 17, 1987, alleging that Fresa was conducting surface mining activities without a valid surface mining permit. Fresa sought administrative review of the validity of the CO, and this review is still under way. 2/ On May 29, 1987, Fresa received from OSMRE

a notice of proposed assessment of a civil penalty in the amount of \$900 for the violation alleged in the CO. Fresa timely requested an informal assessment conference with OSMRE's assessment conference officer, and this conference was held on August 3, 1987.

By letter dated August 21, 1987, OSMRE's assessment conference officer notified Fresa that the proposed assessment of \$900 had been affirmed. Fresa asserts that it received this letter on August 25, 1987. 3/

1/ The document filed by Fresa is actually styled "Petition for Appeal of Order of Dismissal." The appropriate document for seeking review of an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding under 43 CFR 4.1150. is a petition for discretionary review. 43 CFR 4.1158, 4.1270. Fresa's filing listed the alleged errors

of the Administrative Law Judge and attached a copy of his Sept. 3, 1987, order. See 43 CFR 4.1270(c); Tri Coal Co. v. OSMRE, 85 IBLA 146, 148 (1985).

2/ Fresa filed an application for review of the validity of the CO and a request for temporary relief. This matter was docketed by the Hearings Division under docket number CH 7-4-R. On June 1, 1987, Administrative Law Judge McGuire issued a decision denying temporary relief and affirming the CO as validly issued. Fresa has appealed Judge McGuire's decision to this Board, which has docketed it as Fresa Construction Co. v. OSMRE, IBLA 87-590.

3/ OSMRE states that it is "without knowledge or information sufficient to form a belief as to the date Fresa received the decision of the [assessment conference officer] and, therefore, denies the averred date of receipt of the decision." We are puzzled that OSMRE is without information on this point of fact, as documents establishing dates for filing periods should

be communicated by certified mail, so that OSMRE presumably has a return receipt card showing the date of service. In the absence of such proof of service, we accept Fresa's assertion as to the date of receipt, which is supported by its Exhibit 3. See Mobil Oil Exploration & Producing South-east, Inc., 90 IBLA 173, 174-75 (1986).

By letter postmarked August 26, 1987, Fresa filed a timely petition for review of the proposed civil penalty with the Office of Hearings and Appeals (OHA), U.S. Department of the Interior, in Arlington, Virginia. ^{4/} However, no check for \$900 (the amount of the proposed civil penalty) accompanied this petition for review. Instead, Fresa sent a check via a second mailing, postmarked September 3, 1987, the ninth day following service of notice from OSMRE that the informal conference was completed.

Also on September 3, 1987, Administrative Law Judge McGuire issued an order dismissing Fresa's petition for review, ruling as follows:

On August 29, 1987, [^{5/}] petitioner filed a written petition for review of [a civil penalty assessment for CO No. 87-11-018-01(l),] but that petition for administrative relief was not accompanied by the full payment of the proposed civil penalty assessment, for placement in an escrow account pending a final determination of that assessment, as required by the provisions of 30 U.S.C. § 1278(c) (1982) and 43 CFR 4.1152(b)(1).

* * * * *

The provisions of 43 CFR 4.1152 further provide that petitioner's failure to have timely prepaid the amount of the proposed civil penalty contemporaneously with the filing of its petition for review of this citation and the resulting proposed civil penalty assessment, has resulted in the facts [sic] of violation having been deemed to be admitted and further serve as the basis for dismissing the petition for review.

Fresa filed a timely petition for discretionary review of Judge McGuire's order of dismissal.

[1] A party seeking administrative review before OHA of a notice of proposed assessment of a civil penalty must file a petition for review with the Hearings Division, OHA, within 15 days from service of notice by OSMRE's conference officer that the informal conference has been completed, if there has been such a conference. 43 CFR 4.1151(b). Cf. 43 CFR 4.1151(a). The regulations state that such petition must be "accompanied by full payment of the proposed assessment" to be placed in an escrow account pending final determination of the assessment. 43 CFR 4.1152(b)(1).

Here, Fresa's petition was timely filed, having been postmarked on August 26, 1987, one day after service of notice that the assessment conference was completed, but the petition was not "accompanied by" prepayment as provided by the regulations. However, a check providing the necessary

^{4/} See 43 CFR 4.1151(b). Petitions for review addressed to OHA are referred to the Hearing Division. See 43 CFR 4.1150.

^{5/} The effective date of filing was actually Aug. 26, 1987, the date the document was postmarked. 43 CFR 4.1107(f). Aug. 29, 1987, was the date that the document was received in the Hearings Division.

prepayment of the amount of the proposed civil penalty was received later, also within the 15-day period established by 43 CFR 4.1151(b).

We do not believe that a literal reading of the filing requirements is appropriate in this case. There has been no failure to file: within 15 days of receipt of notice Fresa filed everything required by the regulations. We have held that there is no reason to impose an unduly restrictive interpretation to a requirement that certain documents be filed "together with" other documents where an applicant has, in fact, complied with the spirit of the filing requirements by providing all that was required within the regulatory time limits. Northwest Exploration Co., 73 IBLA 123 (1983); see also R. Gerald Jones, 101 IBLA 57, 63 (1988). So it is here.

Accordingly, we hold that where a petition for review of a proposed civil penalty is filed and full prepayment is made, within whichever one of the time periods prescribed by 43 CFR 4.1151 is applicable, in the correct office (that is, the Hearings Division, OHA, in Arlington, Virginia), the fact that the petition is not literally "accompanied by" the prepayment should not result in dismissal of the petition.

The reason for a deadline for filing administrative appeals is to provide a point in time where the Government may determine with certainty that proceedings concerning a decision by its administrative agency are at an end and the decision is no longer subject to challenge, in order to protect other parties to the proceeding and the public interest. See Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978); Lloyd M. Baldwin, 75 IBLA 251, 252 (1983). See also 51 FR 16319-21 (May 2, 1986). This purpose is in no way harmed by reading the filing requirements less than literally here because we are preserving the mandatory time limit for filing a petition for review. Bill Smith Coal Co. v. OSMRE, 101 IBLA ____ (1988). 6/ We do not think preserving a petition from dismissal in these circumstances adversely affects the Department or any private interest.

The appropriate action in these circumstances is to grant the petition for discretionary review, reverse Judge McGuire's order dismissing the petition for review, and remand the matter for further proceedings in accordance with 43 CFR 4.1150. 7/ As the issue of the fact of violation

6/ In Bill Smith Coal Co. v. OSMRE, supra (decided contemporaneously with this case), we hold that a petition for review of a proposed civil penalty is properly dismissed where the petition is timely filed, but prepayment is made in an incorrect office after the deadline for filing the petition prescribed by 43 CFR 4.1151(b). Thus, our holding in this case is limited to situations where the petition and prepayment are both timely received and properly filed.

7/ Fresa has requested that, in the event of a remand, an order be entered "removing Judge McGuire from further proceedings in this matter as the result of his bias and prejudice against Petitioner and that the Secretary

has already been fully litigated before Judge McGuire in Fresa Construction Co. v. OSMRE, Hearings Division Docket Number CH 7-4-R, and is presently on appeal to this Board (see note 2 supra), it would appear that the scope of the hearing would be limited to the propriety of the civil penalty imposed by OSMRE. 30 CFR 723.19(a).

[2] Fresa's petition for discretionary review includes a request that it be awarded its attorney fees and costs incurred in this matter. A request for award of costs and expenses under section 525(e) of SMCRA must be filed within 45 days of receipt of a final order in a proceeding, with the Administrative Law Judge or the Board, whichever issued the final order. 43 CFR 4.1291. Had Judge McGuire's order become final, Fresa's request would properly have been filed with him. Since it did not become final, the request is not properly filed with us at this time and is dismissed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for discretionary review is granted, the order dismissing the petition for review is reversed, and the matter is remanded to the Hearings Division.

Will A. Irwin
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge

fn. 7 (continued)

be instructed to appoint an Administrative Law Judge other than Judge McGuire to conduct all future proceedings deemed necessary in this matter." See 43 CFR 4.27(c). Fresa bases this very serious charge on the fact that Judge McGuire issued his order of dismissal before the expiration of the 15-day filing period prescribed by 43 CFR 4.1151(b) and did not mail the order until the day it expired. The timing of the issuance of the order was entirely consistent with Judge McGuire's reading of the language of 43 CFR 4.1152(b) that a petition for review must be "accompanied by full payment" of the proposed penalty. Under this reading, any petition that was received without prepayment would be immediately subject to dismissal regardless of whether prepayment was subsequently filed, and when the order was mailed would be irrelevant. Although we have not affirmed his literal reading, Judge McGuire's ruling can hardly be construed as demonstrating bias and prejudice against Fresa. See United States v. Paul B. Fisher, 37 IBLA 80, 84 (1978); United States v. Lloyd W. Booth, 76 I.D. 73, 80 (1969). Fresa's request is denied.